Kumpulan Promista Development Sdn Bhd v Haw Ah Bee Construction Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R1–25–42 OF 1998
KC VOHRAH J
19 OCTOBER 1999

Arbitration *— Award — Setting aside — Respondent granted order to enforce award — Applicant applied for extension of time to apply to set aside award — No application made to set aside earlier order — Whether court could set aside order made by court of co-ordinate jurisdiction*

The applicant applied — after a delay of about nine months — for extension of time to apply to court to set aside an arbitration award. Prior to this application, the respondent was granted an order to enforce the award. There was no application to set aside the order.

Held, dismissing the application to set aside the award and the application for leave to file such application for extension of time:

It is not open for this court by allowing the application for extension in time, to, in effect, set aside the order made by a court of co-ordinate jurisdiction in the circumstances. The application for extension of time to file the arbitration order cannot be entertained as there has been a supervening event where the order of its enforcement has been obtained in the High Court which is already perfected (see p 682C–D); *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 distinguished.

[Bahasa Malaysia summary

Pemohon telah memohon — setelah satu kelewatan selama lebih kurang sembilan bulan — untuk lanjutan masa bagi memohon kepada mahkamah mengetepikan satu award timbangtara. Sebelum permohonan ini, responden telah diberikan satu perintah untuk menguatkuasakan award tersebut. Tiada permohonan untuk mengetepikan perintah tersebut.

Diputuskan, menolak permohonan untuk mengetepikan award tersebut dan permohonan untuk kebenaran memfailkan permohonan tersebut untuk perlanjutan masa:

Adalah tidak terbuka kepada mahkamah dengan membenarkan permohonan untuk lanjutan masa, untuk, mengetepikan perintah yang dibuat oleh suatu mahkamah yang mempunyai bidang kuasa yang setara di dalam keadaan-keadaan tersebut. Permohonan untuk lanjutan masa bagi memfailkan perintah timbangtara tidak dapat dilayan kerana terdapat peristiwa yang berlaku di mana perintah penguatkuasaan tersebut telah diperolehi oleh Mahkamah Tinggi

A yang telah pun disempurnakan (lihat ms 682C–D); *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 dibeza.]

Notes

B For cases on setting aside of arbitration award, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 957–979.

Cases referred to

C *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 (distd)

State Government of Sarawak v Chin Hwa Engineering Development Co [1995] 3 MLJ 237 (refd)

D **Legislation referred to**

Rules of the High Court 1980 O 42 r 13, O 69 r 4(b)

Baljit Singh (*Abdul Shukor* with him) (*Shukor Baljit & Partners*) for the applicant.

CC Choo (*CC Choo & Co*) for the respondent.

E

Cur Adv Vult

KC Vohrah J: There is an application before me to extend time in order to enable the applicant to apply to this court to set aside an arbitration award made on 28 May 1997. Under O 69 r 4(b) of the Rules of the High Court 1980 ('the RHC'), an application to set aside the award may be made at any F time within six weeks after the award has been made and published to the parties. There has been a delay of about nine months for this application (filed on 25 February 1998) from the date of the award.

On 17 September 1997 in OS R2-24-52-1997, an order was obtained by Tetuan Haw Ah Bee Construction Sdn Bhd (the respondent presently) G to enforce the arbitration award. Under O 42 r 13 of the RHC, an applicant who wishes to set aside the order must make his application to the court within 30 days after the receipt of the order by him. There is no application to set aside the order.

Since the High Court order for the enforcement of the arbitration H award has been perfected, I do not see how a court of co-ordinate jurisdiction may give an order which has the effect of setting that perfected order aside. The argument that the arbitrator had awarded compensation on a quantum meruit basis and not a contractual basis is a matter that could have conceivably been raised in the earlier proceedings by the party concerned resisting such proceedings to enforce the award (see the case of I *State Government of Sarawak v Chin Hwa Engineering Development Co* [1995] 3 MLJ 237 at p 244 where the matter of such 'passive remedy' is briefly discussed) but the party was absent at the hearing of the originating

summons. The party concerned did not apply to have the matter set aside nor did the party appeal against the order. The case precedent cited by counsel for the party to support the argument that the earlier order of the High Court can be set aside does not in fact support the argument which he takes. Counsel had argued that because the arbitrator is alleged to have made a fundamental error in allowing the claim on the basis of quantum meruit when it was not open to him, the perfected High Court order can be set aside ex debitio justitiae and relied on *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393. But the case cited is concerned with an order of sale relating to a transaction which was prohibited by statute and which consequently was set aside ex debitio justitiae. Here there is no issue of the matter of a contravention of a prohibition by statute. It is not open for this court by allowing the application for extension in time, to, in effect, set aside the order made by a court of co-ordinate jurisdiction in the circumstances.

In my view, the application for extension of time to file the arbitration order made on 28 May 1997 cannot be entertained as there has been a supervening event where the order of its enforcement has been obtained in the High Court which is already perfected.

The whole of encl 7 which includes the application to set aside the award and the application for leave to file such application for extension of time is dismissed with costs.

Application to set aside award and application for leave to file application for extension of time dismissed.

Reported by Loo Lai Mee